ORISSA HIGH COURT: CUTTACK.

W.P.(C) No. 9251 of 2003

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Sukadev Acharya & another ..... Petitioners

-Versus-

State of Orissa & others ..... Opp. Parties

For Petitioner : M/s. J.K Rath, S.N. Rath, P.K. Rout, S. Mishra, C.K. Rajguru and D.N. Rath

For Opp. Parties : Addl. Government Advocate (For opp. Party no.1)
M/s. D. K. Mohapatra, Miss Minati Mishra (For opp. Party nos.2 & 3)

PRESENT :

THE HONOURABLE SHRI JUSTICE S.N.PRASAD

Date of hearing and judgment :- 25.06.2015

S. N. Prasad, J. Heard.

2. The petitioner has approached this Court to regularize them in service in the regular establishment of the Rourkela Development Authority.

3. The case of the petitioners is that they have been engaged as Work Sarkars under the then Rourkela Regional Improvement Trust and accordingly started discharging their duties having been appointed on 1.4.1983.

4. The petitioner no.1 was engaged as Work Sarkar on N.M.R. basis since March, 1983 and the petitioner no.2 engaged since March, 1979 on payment of consolidated amount. To that effect, orders have been issued by the opposite party-Trust at that time subsequently the petitioners have been engaged and performed their duties as Work Sarkars.

5. The petitioners thereafter had appeared before the Departmental Promotion Committee and directed to be engaged on temporary Work Sarkars initially for a period of 89 days subsequently for a period of 44 days on the basis of in the scale of pay of Rs.800 – 1150/- so far as the case of petitioner no.2 is concerned, while the petitioner no.1 was engaged as Work Sarkar on 44 days on the basis of consolidated amount of Rs.900/- per month. Accordingly, both the petitioners were continuing to discharge their duties as Work Sarkars.

6. Though the petitioners have been directed to perform their duties by engaging them on 44 days basis but actually the petitioners have permitted to work without any break.

7. The Rourkela Regional Improvement Trust has been renamed as Rourkela Development Authority by virtue of notification No.30935/HUD dated 15.10.1995. Being the employee of Rourkela Regional Improvement Trust the petitioner's service have been taken and they have been permitted to discharge their duties under Rourkela Development Authority.

8. The grievance of the petitioners is that they were continuing in service regularly but the opposite parties have not taken them in the regular establishment.

9. However, after considering the grievance of the petitioners, the Establishment Committee of the Rourkela Development authority conducted a meeting and it was held on 06.04.2010 considering the case of the petitioners apart from other items. To adjudicate the case of the petitioner in paragraph-5 with the heading "Adhoc DLRs" wherein a decision has been taken by the RDA to regularize them, the relevant portion which is being reproduced herein below:-

> *"The adhoc employees who have been engaged under RDA since 1978 to 1983 against the existing vacant posts and as per power conferred at item No.5 of the 3rd Authority meeting, by specially creating of 5 (five) additional posts as per the seniority and qualification.*
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> *It has also been resolved by the Committee that the case of Sri Maheswar Biswal-petitioner no.2 (date of joining 22.05.1979) and Sri sukadev Acharya-petitioner no.1 (date of joining 1.4.1983) the Committee took a decision that they can be absorbed in the regular post of Chainman (new) and Ferro printer respectively only after final disposal of the Writ Petition filed by them against the authority pending before the Hon'ble High Court of Orissa."*

10. The grievance of the petitioners is that in spite of decision having been taken by the establishment committee in the meeting held on 6.4.2010, the decision has not been

implemented rather the authorities have taken a decision to absorb the petitioner under work charge establishment.

11. The contention of learned counsel for the petitioner is that the petitioner cannot be absorbed under the work charge establishment rather they have to be absorbed in the regular establishment by regularizing them in service. In view of the submission and considering the ratio laid down by the judgment rendered by the Hon'ble Supreme Court in the case of **Secretary, State of Karnataka and others vrs. Umadevi and others** reported in (2006) 4 SCC 1 at paragraph-53 it has been held as follows:-

> ***53***. *"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa,(1967) 1 SCR 128 :AIR 1967 SC 1071, R.N. Nanjundappa, (1972) 1 SCC 409 : (1972)2 SCR 799 and B.N. Nagarajan, (1979) 4 SCC 507 and referred in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled buy this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in case where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional*

requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

12. It is also settled in the judgment rendered by the Hon'ble Supreme Court in the case of **State of Karnataka and others vrs. M.L. Kesari** and others reported in (2010) 9 SCC 247 at para-10 which is quoted herein below:-

> "***10***. *At the end of six months from the date of decision in* ***Umadevi*** *cases of several daily wage/ad-hoc/casual employees were still pending before courts. Consequently, several departments and instrumentalities did not commence the one-time regularization process. On the other hand, some government department or instrumentalities undertook the one-time exercise excluding several employees from consideration either on their ground that their cases were pending in courts or due to sheer oversight. In such circumstances, the employees who were entitled to be considered in terms of the para-53 of the decision in* ***Umadevi*** *will not lose their right to be considered for regularization, merely because the one-time exercise was completed without considering their cases, or because the six months period mentioned in para-53 has expired. The one-time exercise should consider all daily wage/ad-hoc/casual employees who had put in 10 years of continuous service as on 10.04.2006 without availing the protection of any interim orders of courts or tribunals. If any employer had held the one-time exercise in terms of para-53 of* ***Umadevi****, but did not consider the cases of some employees who were entitled to the benefit of para-53 of* ***Umadevi****, the employer concerned should consider their cases also, as a continuation of the one-time exercise. The one-time exercise will be concluded only when all the employees who were entitled to be considered in terms of para -53 of* ***Umadevi****, are so considered."*

13. It is also settled by the judgment rendered by the Hon'ble Supreme Court in the case of **State of Jharkhand and others vrs. Kamal Prasad and others** reported in (2014) 7 SCC 223 at para-14, it has been held that:-

> "***14***. *The Division Bench of the High Court after referring to State of Karnataka v. Umadevi has clearly held that if a person has served for 10 years or more, then it is the duty of the State Government to consider his case for regularization in the post. The said conclusion came to be reached by relying on Articles 309, 14, 16 of the Constitution of India. Relying upon Umadevi, the High Court has further referred to the judgment in State of Karnataka vrs. M.L. Kesari which is considered by this Court and this Court has clearly held that Umadevi casts duty upon the State Government to take steps to regularize the services of those irregularly appointed appointees, who had served for more than 10 years without the benefit or protection of any interim order. Further in the said case, this Court has declared that is has been clearly ordered that one-time settlement/measure should be taken within six months i.e. from 10.04.2006."*

14. By referring the said judgment of the Hon'ble Supreme Court it has been submitted by learned Senior Counsel for the petitioner that RDA has taken a decision in view of the judgment pronounced in the meeting held on 6.4.2010 but the same has not been implemented rather the authorities have decided to absorb the petitioners under the work charge establishment which is absolutely illegal and arbitrary decision of the opposite parties.

15. On the other hand learned counsel for the opposite party-Rourkela Development Authority has argued the case and by refuting the prayer of the petitioners stating that although the decision has been taken by the RDA in its meeting held on 6.4.2010. However, same has not given effect by the RDA but it cannot be said that the RDA has not taken any decision rather decision has been taken for absorbing the petitioners under the work charged establishment, the petitioners has been offered the said order for their absorption in the work charge establishment, it is the petitioners who refused to accept the

same and as such no fault has been committed on the part of the RDA.

16. Further submission has been made by learned counsel for the opposite party-RDA that RDA has taken a decision in view of the resolution of Housing and Urban Development dated 13.07.2013 wherein a decision has been taken that the RDA on the basis of the provision laid down in Odisha Work Charged Employees (Appointment and Conditions of Services) Instructions, 1974 to regularize the petitioners under the work charged establishment and the RDA being under Housing and Urban Development Department and accordingly RDA has taken a decision in the light of the resolution of the Government dated 13.07.2013 and offered the petitioners for their absorption in the work-charged establishment.

17. Heard the parties at length.

18. The fact which is not disputed in this case is that both the petitioners were performing their duties right from the year 1979 and 1983 respectively.

19. The contention of the petitioners is that they were continuously discharging their duty has not been disputed by the RDA. The fact that the petitioners have not discontinued from service is also apparent that the meeting held on 6.4.2010 wherein the Committee has taken a decision to regularize the petitioners taking into consideration the fact that the petitioners are working in daily rated basis or as Work Sarkars in between the year 1979 to 1983 have been regularized by creating five additional posts apart from the existing post of RDA. Further

decision has been taken by the Committee that the case of the petitioners can be considered for absorption only after disposal of the writ petition.

20. This aspect of the matter which is the basis of the decision held on 6.4.2010 the same has been annexed by the petitioners in Misc. Case No.12945 of 2013 as contained in Annexure-9 which has not been considered by the RDA or by the State Government.

21. In the light of the ratio laid down in the case of **Umadevi** the proposition of law is settled if a daily rated employee working for more than 10 years continuously without any support of order or any interim measure passed by any Court of law shall be regularized by way of one time exercise and the said exercise has been directed to be completed within a period of 6 months.

22. These ratio stipulates that an employer if need of service on the daily rated basis, the authority will be duty bound to take them in regular establishment or if the authority is no need of service, the authority will be at liberty to throw them out from the service.

23. In the case at hand the petitioners have been working right from the year 1979 and 1983 regularly without any break and this fact has not been disputed by the RDA. The ration laid down by the Hon'ble Supreme Court in the case of **Umadevi** squarely applicable to the case of the petitioners.

24. Further reference of the judgment rendered by the Hon'ble Supreme Court in the case **State of Karnataka and**

others vrs. M.L. Kesari reported in (2010) 9 SCC 247 is also watch to be seen which has been decided in the light of the observation at paragraph-53 of **Umadevi (3)** from their lordships in the case of **M.L. Kesari**.

25. The RDA after taking into consideration the settled proposition of law has taken the matter in the meeting held on 6.4.2010 and accordingly decided to regularize in service. But the benefit of the decision of the meeting held on 6.4.2010 has not yet been implemented.

26. Learned counsel for the RDA at this juncture has submitted that the RDA also wanted to regularize in service but it is due to the resolution of the Government dated 13.07.2013 the effect of the decision taken in the meeting held on 16.04.2010 has not been given.

27. Perused the resolution dated 13.07.2013 issued by the Housing and Urban Development Department (Annexure-D/2) to the additional affidavit which has been referred on the basis of the Odisha Work Charged Employees (Appointment and Conditions of Services) Instructions, 1974 and by which the decision has been taken to take service of the petitioner under the work-charged establishment.

28. So far as he implication of the resolution dated 13.07.2013 is concerned, the said resolution since been issued on the basis of executive instruction issued in the year 1974 by the Government of Odisha in Odisha Work Charged Employees (Appointment and Conditions of Services) Instructions, 1974 and as such it needs to decide as to whether executive instruction will be followed or the judicial pronouncement of the

Hon'ble Supreme Court by its constitutional rule will prevail. To adjudicate this issue it needs to refer Article 141 of the Constitution of India which speaks regarding binding proceeding laid down by the Hon'ble Supreme Court.

29. The binding principle of the judgment has been discussed in the recent judgment reported in AIR 2015 S.C. 375 in the case of **Balwant Rai Saluja & Another vrs. Air India Limited & others** at paragraph-25 it has been held as follows:-

> *"The binding nature of a decision would extend to only observations on points raised and decided by the Court and neither on aspects which it has not decided nor had occasion to express its opinion upon. The observation made in a prior decision on a legal question which arose in a manner not requiring any decision and which was to an extent unnecessary, ought to be considered merely as an obiter dictum. A ratio of the judgment or the principle upon which the question before the Court is decided must be considered as binding to be applied as an appropriate precedent."*

30. Since the resolution dated 13.07.2013 has been passed by executive instruction in the year 1974, the day when there is no judgment by the Hon'ble supreme Court as has been referred in the case of **Umadevi** since the said judgment has been pronounced on 10.04.2006 and as such after 10.04.2006 it will be presumed the instruction, 1974 which is contrary to the rule of the Hon'ble Supreme Court at paragraph-53 will have binding effect on the State Government. In view of the proposition as contained in Article 141 of the Constitution of

India as also held by the Hon'ble Supreme Court in the case of Balwant Rai Saluja (supra).

31. Since the decision has been taken by the Government dated 6.4.2010 that after the judgment in the case of **Umadevi** i.e. 10.04.2006. The ratio laid down by the Hon'ble Supreme Court in the case of **Umadevi** at paragraph-53 will prevail over and above executive instruction in the year 1974 in view of the said reason.

32. Since as per the contention of learned counsel for the RDA that although the same has not been stated on oath but orally stated it is due to the resolution dated 13.07.2013, decision has been taken by the meeting on 10.04.2006 has not been implemented.

33. This contention of learned counsel for the RDA is absolutely contrary to the legal proposition because that moment they have taken decision in the meeting 06.04.2010 to have regularize the petitioner in service and they are awaiting for the outcome due to pending writ petition and as such they cannot take the plea that it is due to the resolution dated 13.07.2013 the petitioners have been offered to be engaged under their work-charged establishment because if an employee has been working since 1979 and 1983 without any break and they have already performed their duty, an employee cannot be permitted to superannuate from the service as daily rated or work-charged employee and that is the reason the judgment has been referred in the case of **Umadevi** if an employee has completed 10 years of service without support of interim order so that daily rated employee may be regularized and they get

pensionary benefit if admissible under the law after his/her superannuation.

34. In view of discussion made hereinabove I hereby direct the Rourkela Development Authority to take a decision in view of their own decision meeting held on 6.4.2010 for regularization the petitioners in service if they are coming under the parameter of the Paragraph-53 of **Umadevi** case, a required decision shall be taken within 10 weeks from the date of receipt of certified copy of this order.

The writ petition is disposed of accordingly.

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S. N. Prasad, J.

Orissa High Court, Cuttack.
Dated the 25th June, 2015/RRJ